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No. 77-589

In the Supreme Court of the United States

OCTOBER TERM, 1977

DANIEL CAHALANE AND NEIL BYRNE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals is reported at 560 F. 2d 601 (Pet. App. A). The opinion of the district court is reported at 422 F. Supp. 147 (Pet. App. B).

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1977. A petition for rehearing was denied on September 21, 1977 (Pet. App. C). The petition for a writ of certiorari was filed on October 21, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government is barred from appealing a district court judgment of acquittal entered after a jury has returned a guilty verdict.

2. Whether petitioners' privilege against self-incrimination was violated by the admission of forms showing that they had registered as foreign agents under the Foreign Agents Registration Act.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioners were convicted of conspiracy and aiding and abetting the exportation of arms and ammunition without a license, in violation of 18 U.S.C. 371 and 22 U.S.C. 1934. The district court entered a judgment of acquittal on the substantive counts and sentenced each petitioner to one year's imprisonment on the conspiracy count. The court of appeals affirmed the conspiracy conviction and vacated the judgments of acquittal, remanding the case to the district court for sentencing on the substantive counts (Pet. App. A).

The evidence, which is undisputed, shows that petitioners were officers in the Irish Northern Aid Committee (NORAID) (Pet. App. A, p. A4), an organization formed in this country to provide financial assistance to the Irish Republican Army (Pet. App. B, p. A22). Between 1970 and 1973, petitioners and others purchased approximately 360 weapons and 100,000 rounds of ammunition.[1] About half of these weapons were seized by British authorities in Northern Ireland (Pet. App. A, p. A4).

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[1]One co-defendant was acquitted by the jury and two other named defendants were fugitives at the time of trial.

After the jury had convicted petitioners, the district court entered judgments of acquittal on the aiding and abetting counts because it believed there was no evidence that petitioners were actually involved in the exportation of firearms without a license (Pet. App. B, p. A38). The court of appeals reversed on the ground that while there was no evidence to show who exported the weapons, there was sufficient evidence of overt and clandestine activities by petitioners and admissions by other members of NORAID to permit the jury to draw an inference that they had aided and abetted the illegal exportation of firearms without a license (Pet. App. A, pp. A7-A8).

ARGUMENT

1. Petitioners contend (Pet. 10-12) that the government's appeal of their judgments of acquittal is either barred by the Double Jeopardy Clause or not permitted by 18 U.S.C. 3731. Neither claim is correct.

In *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 569-570, this Court reaffirmed the principle that "where a Government appeal presents no threat of successive prosecutions, the Double Jeopardy Clause is not offended." Since the court of appeals' decision will only require reinstatement of the jury's guilty verdict and not a retrial, the Double Jeopardy Clause does not bar the government's appeal.

The Court in *Martin Linen* also reaffirmed the principle that "unless barred by the Double Jeopardy Clause of the Constitution, appeals by the Government from the judgments of acquittal entered by the District Court under Rule 29(c) [of the Fed. R. Crim. P.] are authorized by §3731." 430 U.S. at 568. See also *United States* v. *Wilson*, 420 U.S. 332, 337; *United States* v. *Jenkins*, 420

U.S. 358, 365 ("* * * where the jury returns a verdict of guilt but the trial court thereafter enters a judgment of acquittal, an appeal is permitted").

2. Petitioners also contend (Pet. 5-10) that their privilege against self-incrimination was violated when the government introduced certain registration statements indicating that they were officers of NORAID. In 1973, NORAID was ordered to register with the government pursuant to the Foreign Agents Registration Act, 52 Stat. 631, as amended, 22 U.S.C. 611 *et seq.* Subsequently petitioners and other members of NORAID submitted short-form registration statements indicating that they were officers in NORAID and that they collected funds for their principal, the Northern Aid Committee located in Belfast, Ireland. These forms were subsequently introduced at petitioners' trial.

Since petitioners did not assert their privilege against self-incrimination when they filed the forms, they were precluded from doing so when the forms were introduced at trial. *Garner* v. *United States*, 424 U.S. 648; *United States* v. *Kordel*, 397 U.S. 1. As the Court noted in *Garner, supra*, at 654, disclosures made without claiming the privilege are not "compelled" incriminations. Here, NORAID resisted registration under the Foreign Agents Registration Act on First Amendment grounds but made no claim that the information disclosed would violate its members' Fifth Amendment rights. See *Attorney General* v. *Irish Northern Aid Committee*, 346 F. Supp. 1384 (S.D.N.Y.), affirmed, 465 F. 2d 1405 (C.A. 2), certiorari denied, 409 U.S. 1080. Petitioners also did not assert their privilege against self-incrimination when they subsequently completed the forms. If the information submitted by petitioners on the forms concerning their membership and positions in NORAID was in fact privileged from

disclosure under the Fifth Amendment (but cf. *California* v. *Beyers*, 402 U.S. 424), petitioners had the same ability to file the form and assert the privilege with respect to that information as the taxpayer had in *Garner* with respect to his occupation as a gambler; and if their assertion of the privilege were well founded, it would have provided them with a defense to prosecution under 22 U.S.C. 618 for not complying fully with the provisions of the Foreign Agents Registration Act. See *Garner, supra,* 424 U.S. at 662-664. Accordingly, petitioners have not been denied a "free choice to admit, to deny, or to refuse to answer" (*Lisenba* v. *California,* 314 U.S. 219, 241; *Garner, supra,* 424 U.S. at 657). Since they failed to claim the privilege against self-incrimination, their disclosures cannot be regarded as having been "compelled" within the meaning of the Fifth Amendment. *Garner, supra.*

Petitioners' further contention (Pet. 9) that the registration provisions of the Act were unconstitutional because mere registration under the Act creates a threat of prosecution is without merit. Petitioners rely on this Court's decision in *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70, holding that members of the Communist Party could refuse to file a registration statement that inquired into "an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admission of a crucial element of a crime" (382 U.S. at 79), and on *Marchetti* v. *United States,* 390 U.S. 39, 48-49, 57 and *Grosso* v. *United States,* 390 U.S. 62, 66-68, holding that the registration requirements of the occupational and excise taxes on gambling, which required disclosures only by gamblers, the great majority of whom were likely to incriminate themselves by responding, were unconstitutional. This case is, however, entirely different.

The registration forms are not directed at a group of people "inherently suspect of criminal activities" *Marchetti* v. *United States, supra,* 390 U.S. at 57. Cf. *Haynes* v. *United States,* 390 U.S. 85; *Leary* v. *United States,* 395 U.S. 6. The Act merely requires agents of foreign principals to submit short-form registration statements to inform the government of their activities on behalf of foreign governments or political parties. 22 U.S.C. 611(b)(1). The purpose of this disclosure is to inform the public of the identity of foreign agents and the purposes for which they act. H.R. Rep. No. 1470, 89th Cong., 2d Sess. 2 (1966); *Attorney General* v. *Irish Northern Aid Committee, supra,* 346 F. Supp. at 1390. Like the taxpayer in *Garner,* petitioners were not exposed to a hazard of self-incrimination merely by completing the forms.[2]

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[2]Since the registration statements filed under the Foreign Agents Registration Act, like tax returns, are not directed at individuals "inherently suspect of criminal activities," petitioners would presumably not have had a right to refuse altogether to file a statement which at a minimum disclosed their identities as agents of some foreign principal. Since petitioners, like the taxpayer in *Garner,* had adequate means to file the form and not disclose the information subsequently used against them, it is unnecessary to decide—as it was unnecessary to decide in *Garner*—whether petitioners would have had immunity against the use of the mere fact of their having filed a statement if that fact subsequently proved relevant in a criminal prosecution. In view of the important regulatory, non-criminal purposes of the statute, *California* v. *Beyers, supra,* would suggest that foreign agents who file information, even under compulsion, might not have immunity from the use of that information in a criminal proceeding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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